

CHAPTER 9 CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISES

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CHAPTER 9 CIVIL RIGHTS AND DISADVANTAGED BUSINESS ENTERPRISES

9.1 INTRODUCTION

This chapter provides guidance for the local agency in complying with the Civil Rights requirements (Title VI, Accessibility, Equal Employment Opportunity [EEO] Contractor Compliance) and Disadvantaged Business Enterprise (DBE) requirements for federal-aid transportation projects. Each of these areas is addressed in more detail in the following sections. The information contained in this section has been extracted from other documents and should not be considered as a replacement or substitute for the laws, rules and regulations, agreements, circulars, and other guidance available.

The Division of Local Assistance (DLA) website provides additional information and resources that complement guidance in this chapter at <http://www.dot.ca.gov/hq/LocalPrograms/>

9.2 NONDISCRIMINATION: TITLE VI OF THE CIVIL RIGHTS ACT

Nondiscrimination provisions apply to all programs and activities of federal-aid recipients, sub recipients, and contractors, regardless of tier (49 Code of Federal Regulations, Part 21). The obligation not to discriminate is based on the objective of Congress not to have funds, which were collected in a nondiscriminatory manner, used in ways that subsidize, promote, or perpetuate discrimination based on race, color, national origin, sex, age, or physical or mental disability, sexual orientation, or retaliation.

The reach of Title VI in the areas of Environmental Justice and the needs of Limited English Proficient populations have expanded jurisdiction, clients, and complexity.

Environmental Justice (EJ), Executive Order 12898, amplifies Title VI by identifying and addressing, as appropriate, disproportionately high and adverse human health; or environmental effects of federal-aid projects on minority populations and low-income populations. The order is also intended to promote nondiscrimination in federal programs substantially affecting human health and the environment; and to provide minority communities and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment.

Limited English Proficiency (LEP), Executive Order 13166, clarifies national origin discrimination as it affects persons with limited proficiency in English. The order requires federal-aid recipients to take reasonable steps to ensure that LEP persons have meaningful access to programs, services, and information free of charge.

Language barriers prohibit LEP persons from:

- Obtaining services and information relating to transportation services, programs, and projects.
- Taking advantage of the transit system, which could affect their jobs and social opportunities.
- Understanding the benefits to which they are entitled when their home or business property is acquired through eminent domain.

IMPLEMENTING TITLE VI

The DLA is responsible for developing policies and procedures in order for local agencies to implement Title VI. DLA has included checks and balances throughout its processes including legal review of major agreements and documents.

Title VI Assurances: Local agencies sign this assurance as part of their Master Agreement with Caltrans (see Exhibit 4-C “Master Agreement-Example,” Chapter 4 of the *Local Assistance Procedures Manual* [LAPM]). The Program Supplement Agreement for each project includes the local agency’s reaffirmation of the Nondiscrimination Assurances contained in the Master Agreement.

Environmental: Presidential Executive Order 12898 (EJ) is considered during the preliminary environmental investigation process and completion of the Preliminary Environmental Study (PES) Form. (See Exhibits 6-A “Preliminary Environmental Studies (PES) Form,” and B “Instructions for Completing the Preliminary Environmental Study (PES) Form,” Chapter 6 of the LAPM or refer to this website:

http://www.dot.ca.gov/hq/LocalPrograms/lam/prog_p/p06envrp.pdf)

If a project requires that a Relocation Impact Study and/or Community Impact Assessment be conducted, the local agency follows the guidance set forth in the Standard Environmental Reference (SER). The SER is an on-line electronic reference that sets forth document content and format, as required by law or regulation; and recommended format, if not specified by law or regulation. Chapter 25 of the SER addresses Environmental Justice (EJ) and LEP requirements:

<http://i80.dot.ca.gov/ser/vol1/sec3/community/ch25ej/chap25ej.htm>

Public Hearings and Public Involvement Meetings: The attendance and concerns of LEP persons, persons with disabilities, minority populations and low income populations at public involvement meetings and hearings must be carefully documented to comply with Title VI of the Civil Rights Act of 1964, including statistics of participants by race and gender. Public hearing announcements must be made available in languages understood by the affected population. Public hearings should be held at locations that are both geographically and structurally accessible. Interpreters should be made available for LEP persons and for the hearing impaired. (See Chapter 8, “Public Hearings,” of the LAPM.)

Right of Way: On federal-aid projects, all Right of Way (R/W) activities are conducted in accordance with the *Caltrans Right of Way Manual*, unless the local agency has adopted its own procedures, which Caltrans has approved. The *Caltrans Right of Way Manual* requires that the public be provided with Title VI information and Title VI complaint procedures within each of the following R/W functions: Appraisals, Acquisition, Relocation Assistance Program (RAP) and Property Management. (See Chapter 13, “Right of Way,” of the LAPM.)

Construction: Federal-aid construction contracts must include provisions, which require compliance with Title VI. The specific contract provision language is included in the FHWA Form 1273 that is physically inserted in the federal-aid construction contract. (See Chapter 12, “Plans, Specifications and Estimate,” of the LAPM.)

Additional Resources for Title VI Implementation: You may access additional information on implementing Title VI (including Potential Title VI Issues, Self Monitoring, Good Practices and Mitigation Measures) in the electronic version of the Caltrans Title VI Guide Book:

http://www.dot.ca.gov/hq/bep/title_vi/t6_guidelines_choice.htm.

Title VI brochures in ten languages are available on the Local Assistance website under Title VI:

http://www.dot.ca.gov/hq/LocalPrograms/DBE_CRLC/DBE_CRLC.html#TitleVI

MONITORING TITLE VI

There are a number of actions that have been developed for the local agencies in meeting federal requirements. Attendance at public meetings by the DLAE and receiving copies of the meeting minutes during the planning stages of local agency projects help to ensure nondiscrimination and EJ are properly being addressed at these early stages of a project.

To ensure continued compliance by the local agencies, checklists along with a review of the Plans, Specifications & Estimate (PS&E) and attendance at public meetings are some of the tools that are used initially; and then used later to facilitate the DLA in performing process reviews and other quality assurance functions. The local agency checklists and PS&Es are reviewed by the DLAE upon receipt to ensure compliance with Title VI as well as other federal and state regulations.

Plans, Specifications & Estimate (PS&E) Checklist: This checklist ensures that the federal and state contract requirements are being implemented. Specifically, it confirms the implementation of the mandatory requirements of FHWA Form 1273, EEO Certification, DBE provisions, and applicable wage rates, etc. The local agency submits the checklist to the DLAE along with the request for authorization to proceed with construction for federal-aid construction contracts.

Local agency preliminary environmental studies (PES), technical reports, environmental assessment (EA) and environmental impact statements (EIS) provide for data collection and analysis on the demographics of neighborhoods and communities. The DLAEs and Caltrans Environmental Specialists review the environmental documents to ensure that no disproportionate adverse impacts occur on minority and low-income neighborhoods or communities.

Both the DLAE and the Caltrans District Right of Way staff ensure compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 by monitoring R/W activities on local projects. (See Chapter 12, “Plans, Specifications & Estimate,” of the LAPM.)

Local Agency Construction Contract Administration Checklist: This checklist confirms that DBE, Labor/EEO compliance requirements are performed and documented in the project files. This checklist documents that the local agency will meet all of these requirements prior to the award of the construction contract. (See Chapter 15, “Advertise and Award Project,” of the LAPM.)

Resident Engineer's Construction Administration Checklist: This checklist is completed by the local agency Resident Engineer. The purpose of the checklist is to assist the local agencies in administering federal-aid highway construction projects. This checklist documents that the data is similar to the Local Agency Construction Contract Administration Checklist. It also provides a record that the EEO/Wage Rate/False Statements Posters are being posted at specific locations, that employee interviews will be conducted in accordance with the Labor Compliance/EEO Interview form, and that DBE requirements are met. The local agency submits the checklist along with the award package shortly after award of the construction contract. (See Chapter 15, "Advertise and Award Project," of the LAPM.)

TITLE VI COMPLAINTS

The procedures in this section have been established to receive and resolve alleged civil rights discrimination complaints concerning a local agency project or projects constructed with federal-aid funds. Caltrans will investigate and submit a report of findings to FHWA within 60 days of receipt of the complaint. The complainant will be informed by the Caltrans Discrimination Complaint Investigation Unit (DCIU) staff of his/her right to appeal the Caltrans findings to FHWA California Division. An appeal will be accepted by FHWA up to 180 days FROM THE DATE OF RECEIPT OF THE DECISION.

Caltrans will include a summary report of its findings on all Title VI complaints in its annual Title VI update report to FHWA.

9.3 ACCESSIBILITY

Section 504 of the Rehabilitation Act of 1973 (codified as 29 USC Subsection 791 et seq.) requires that any entity receiving federal financial assistance must ensure that persons with disabilities are not discriminated against in any and all aspects of employment, or denied access to the goods or services that these federal fund recipients provide.

The intent of the Americans With Disability Act (ADA) (Public Law 101-336, codified as 42 USC 12101 et seq.) is to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for persons with disabilities." This law extended the protections offered for persons with disabilities.

28 CFR, Part 35 requires that facilities constructed by, on behalf of, or for the use of a public entity shall be designed and constructed, so that the facility is accessible to, and usable by persons with disabilities.

49 CFR, Part 27 requires nondiscrimination on basis of disability in programs and activities receiving or benefiting from federal financial assistance.

The State of California has also adopted regulations—Title 24 of the California Government Code, specifying that all buildings, structures, sidewalks, curbs and related facilities constructed in California by the use of State, county or municipal funds, or the funds of any political subdivision of the State, shall be accessible to and usable by persons with disabilities.

IMPLEMENTATION

Assurances: Administering agencies sign this assurance, as part of their Master Agreement with Caltrans (see Exhibit 4-C “Master Agreement-Example,” Chapter 4 of the LAPM). The Program Supplement Agreement for each project includes the administering agency’s reaffirmation of the Nondiscrimination Assurances contained in the “Local Agency-State Agreement for Federal-Aid Projects.”

Design: State and local governments, regardless of whether they receive federal financial assistance, are required to comply with the Federal ADA Accessibility Guidelines (ADAAG), Title 24, or local code, whichever provides the greatest access. Private-funded improvements are required to comply with the ADAAG and with Title 24; whichever code offers the greatest access or protections to individuals with disabilities.

DLA’s role is to help ensure that all new and existing altered pedestrian facilities such as, but not limited to, highway rest area facilities, sidewalks, crosswalks, pedestrian overpasses, underpasses and ramps, shall be made accessible to persons with disabilities in accordance with federal and state accessibility standards on all local agency federal-aid projects. (See Chapter 11, “Design Standards,” of the LAPM.)

MONITORING

Field Reviews: During the field review, agreement is reached among all interested parties (local agency, DLAE, FHWA) on the general design features and exceptions for the project. ADA deficiencies are discussed and agreed upon at this time. (See Chapter 7, “Field Reviews,” of the LAPM.)

Plans Specifications & Estimate (PS&E) Checklist: Local agencies certify that their project’s PS&E complies with all applicable federal and state regulations and codes. A PS&E checklist form helps to ensure local agency compliance. ADA compliance is included in this checklist (See Chapter 12, “Plans, Specification & Estimate,” of the LAPM).

Final Inspection: The local agency conducts the final inspection and certifies on the Final Inspection Form that the project was constructed in accordance with the scope and description of the project authorization document and that all federal and state requirements have been met. The DLAE reviews the job site and verifies completion on the Final Inspection Form. (See Chapter 17, “Project Completion,” of the LAPM.)

COMPLAINTS

Follow the same process and procedures for Title VI complaints detailed above. (Please see 9.2 Nondiscrimination: Title VI of the Civil Rights Act.)

9.4 EQUAL EMPLOYMENT OPPORTUNITY CONTRACTOR COMPLIANCE

Federal-aid Highway Act of 1968 (23 USC 140(a)) and implementing regulations at 23 CFR 230, require that the local agency that receives federal financial assistance shall assure that employment in connection with federal highway construction projects is provided without regard to race, color, creed, national origin or sex.

The local agency is also required to include notification of a federal-aid contractor's EEO responsibilities in the advertised contract specifications. In addition, the local agency shall maintain and make available apprenticeship, skill improvement or other upgrading programs, which provide equal opportunity for training and employment without regard to race, color, creed, national origin or sex.

23 CFR 635.117—Sets forth FHWA policies and procedures relating to federal-aid highway projects from authorization to final acceptance by FHWA. It includes a statement encouraging local agencies to use DBEs. Other sections of the CFR include nondiscriminatory bidding procedures, subcontractor and contractor responsibilities, labor, employment and Indian preference provisions, payroll and statements of wages paid, and contract termination procedures.

Form FHWA 1273 "Required Contract Provisions for Federal-Aid Construction Contracts" is a standard form containing required contract provisions and proposal notices, and is required to be physically inserted in each federal-aid highway construction contract and subcontracts (at any tier) of \$10,000 or more. When a contractor signs a federal-aid contract of \$10,000 or more, the nondiscrimination provisions in the Form FHWA 1273 constitutes the contractor's Equal Employment Opportunity/Affirmative Action Program standards for that contract.

IMPLEMENTATION

Assurances: Local agencies sign assurances as part of their Master Agreement with Caltrans. Appendix A to Exhibit B of the Master Agreement includes nondiscrimination in the selection and retention of subapplicants and the prohibition of discrimination in employment practices. (See Exhibit 4-C "Master Agreement-Example," Chapter 4, of the LAPM.)

Required Federal Contract Provisions: Local agencies shall physically insert the Form FHWA 1273 in the contract document. Local agencies are aware that contractor noncompliance with the EEO specifications in the Form FHWA 1273 may be considered a breach of contract for which payment may be withheld, or the contract terminated. (See Chapter 12 "Plans, Specifications & Estimate," of the LAPM.)

Construction: Federal-aid prime contractors and subcontractors employment practices in the areas of recruitment and selection decisions (hiring, promotions, terminations, training, etc.) are to be conducted without regard to race, color, creed, national origin, age, disability, or sex.

The local agency's resident engineer should be cognizant of the contractual requirement and monitor the contractor for compliance. Specifically, the resident engineer's area of concern should be whether discriminatory practices take place, particularly in the hiring, firing, training, promotion, and utilization of employees. (Section 16.12 "Equal Employment Opportunity," Chapter 16 of the LAPM.)

MONITORING

The three checklists listed above in the Section 9.2 Nondiscrimination: Title VI of the Civil Rights Act, serve to assist local agencies in implementing EEO and as a monitoring tool for DLAEs to ensure that EEO requirements are met. In addition, DLA performs periodic EEO process reviews that include a review of DLAE, local agency, and contractor.

The Caltrans Civil Rights Office includes local agency contracts in their compliance reviews of federal-aid contractors.

REPORTING

The federal-aid contractor on federal-aid construction contracts that are active during the last full pay period in July completes “Form FHWA PR-1391, Federal-Aid Highway Construction Contractors Annual EEO Report,” (see Chapter 16, “Administer Construction Contracts,” of the LAPM).

9.5 DISADVANTAGED BUSINESS ENTERPRISE

Caltrans is required under 49 CFR, Part 26 to administer a DBE Program. The DBE Program is intended to remedy past and current discrimination against DBEs, ensure a level playing field and foster equal opportunity in federal-aid contracts.

In this manual, federal-aid contracts refer to U.S. DOT assisted-contracts that include funding from the FHWA, Federal Transit Administration (FTA) and the Federal Aviation Administration (FAA).

BACKGROUND

For several years, Caltrans through local agencies implemented a DBE Program in accordance with applicable requirements and included race-conscious components in the program. In May 2005 the Ninth Circuit Court of Appeals issued a decision on *Western States Paving, Inc. vs. Washington Department of Transportation, et al*, which required the State of Washington to comply with new evidentiary standards necessary to constitutionally support the use of race-conscious DBE goals such as those being used by Caltrans. The decision is binding on the states within its jurisdiction, including California.

Caltrans initiated a public comment period to request submission of evidence and information from the public that would support its current race-conscious DBE program.

After consideration of comments received during the public comment period, Caltrans determined that it is unable to continue with any level of a race-conscious DBE program, and that DBE participation will be achieved solely by race-neutral measures.

On May 1, 2006, Caltrans implemented a race-neutral DBE program, which includes the following changes:

- Local agencies will no longer have their own separate DBE programs unless such programs have been approved directly by a federal agency. Instead, local agencies must complete a “Disadvantaged Business Enterprise Race-Neutral Implementation Agreement,” as discussed in Section 9.6 of this chapter.
- Local agencies may no longer advertise and award contracts with federal-aid funds containing race-conscious DBE goals.
- Local agencies will still collect and report participation and utilization by DBEs on federal-aid contracts.
- All federal-aid procurements shall contain race-neutral DBE contract language. (See “Sample Notice to Contractors and Special Provisions” and “Sample Proposal and Contract” available to download from the DLA website:
http://www.dot.ca.gov/hq/LocalPrograms/sam_boil/sam_boil.htm

Changing from a race-conscious to a race-neutral DBE program is not retroactive, so contracts executed prior to the implementation date (May 1, 2006), and amendments thereto with race-conscious DBE contract participation goals are not affected by the new race-neutral DBE program. In terms of contract monitoring, those prime contractors or prime consultants that were awarded contracts with race-conscious DBE participation goals would still be required to meet those goals during performance of the contract. The request for DBE substitution process would also continue for the term of those contracts.

DBE DEFINITIONS

“Annual Anticipated DBE Participation Level (AADPL)” - The level of participation that the local agency would expect DBEs to achieve in the absence of discrimination and the effects of past discrimination on federal-aid contracts awarded in its jurisdiction in a given Federal Fiscal Year (FFY). This includes an assessment of the availability for specific items of work that DBEs could reasonably be expected to compete for subcontracting opportunities on a federal-aid contract and their likely availability for work on federal-aid contracts that will be awarded in a given fiscal year. The AADPL is not a goal that the local agency needs to achieve, but the AADPL will be used by the Department to establish a statewide overall DBE participation goal as required by Title 49, Part 26 of the CFR. The local agency must have an approved AADPL on file with the DLAE before federal funds can be authorized on any new federal-aid consultant or construction contract.

“Disadvantaged Business Enterprises (DBE)” - A-for-profit “small business concern” that is at least 51 percent owned and controlled by one or more socially and economically disadvantaged individuals. One or more such individuals must also control the management and daily business operations. These individuals must be citizens (or lawfully admitted permanent residents) of the United States and (1) any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis, or (2) who are either Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, women, or any other group found to be socially and economically disadvantaged by the Small Business Administration.

“Race-conscious measure or program”- One that is focused specifically on assisting only DBEs. The use of contract goals is the primary example of a race-conscious measure in the DBE program.

“Race-neutral measure or program”- A race-neutral measure or program is one that, while benefiting DBEs, is not solely focused on DBE firms. For example, small business outreach programs, technical assistance programs, and prompt payment clauses can assist a wide variety of small businesses, not just DBEs. For purposes here, race-neutral includes gender neutrality.

“Small Business Concern” - Small Business Concern means, with respect to firms seeking to participate as DBEs in U.S. Department of Transportation (DOT) assisted contracts, a small business concern as defined pursuant to Section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR

Part 121) that also does not exceed the cap on average annual gross receipts specified in Section 26.65(b) of 49 CFR.

“Statewide Overall DBE Goal” - As required by federal regulation, Caltrans has established a statewide overall DBE goal. This is the level of participation that Caltrans would expect DBEs to achieve in the absence of discrimination and the effects of past discrimination in a given fiscal year. In order to ascertain whether the Statewide Overall DBE Goal is achieved, Caltrans will track DBE participation on all federal-aid contracts.

DBE PROGRAM RESPONSIBILITIES

FHWA RESPONSIBILITIES

The Federal Highway Administration (FHWA) administers the payment of federal-aid highway funds to recipients: states, counties, cities, and other agencies such as transit districts for transportation related projects. The FHWA is responsible for monitoring these agencies for compliance with Title VI and other aspects of the Civil Rights Acts of 1964, 1968, and 1973, all concerning nondiscrimination in administration of federal funds.

CALTRANS RESPONSIBILITIES

Office of Civil Rights

Office of Civil Rights responsibilities include:

- The Disadvantaged Business Enterprise Program in the Office of Civil Rights administers the State of California, Department of Transportation Disadvantaged Business Enterprise (DBE) Program Plan (Caltrans DBE Program Plan).
- Maintains a directory of certified DBE contractors.
- The DBE Program, in the Office of Civil Rights, assists the District Local Assistance Engineer (DLAE) and the DLA in responding to local agency requests for assistance with questions/issues relative to DBE matters.
- Assist with training courses for district and local agency staff.

Division of Local Assistance (DLA) and District Local Assistance Engineer (DLAE)

Local Assistance responsibilities include:

- DLA will provide assistance to DLAE and district staff with questions/issues relative to DBE matters.
- DLA and the DLAE monitor local agency compliance with DBE program requirements by conducting process reviews. The FHWA will be invited to participate in these process reviews.
- DLA assembles statewide local agency DBE final utilization information and provides information for reports for FHWA.
- DLA will monitor districts for procedure compliance.

- DLA and the DLAE assist with training courses for district and local agency staff.
- The DLAE ensures that local agencies with federal-aid contracts submit the local agency's "Race-neutral Implementation Agreement" (Exhibit 9-A).
- The DLAE reviews and approves the local agency's DBE Annual Submittal Form (See Exhibit 9-B).
- The DLAE is the focal point for advice and assistance to the local agencies on DBE matters.
- The DLAE will ensure that the final DBE Utilization Report (for consultant and construction contractors) is reported to the DLA for inclusion in the Caltrans DBE report to FHWA.
- The DLAE is responsible for DBE oversight of local agencies pursuant to the *Local Assistance Procedures Manual* (LAPM) regulations.
- The DLAE will review at least one contract per year for each local agency with an active construction project. This will include review of records of DBE and non-DBE subcontractor utilization, substitutions, and DBE complaints, as well as checking if and verification that a DBE Liaison Officer has been designated.
- The DLAE will review at least one complete PS&E package for the required provisions (including DBE requirements) per year. If deficiencies are discovered, more frequent reviews should be conducted and a corrective action plan is to be submitted by the local agency for the DLAE's approval.
- The DLAE will maintain a list of each local agency's designated DBE Liaison Officer, which will be updated annually with the local agency's submittal of their DBE Annual Submittal Form.
- The DLAE will maintain a file with an index of all local agencies DBE Race-Neutral Implementation Agreements and DBE Annual Submittal Forms. Information from these forms will be entered into LP2000.

LOCAL AGENCY RESPONSIBILITIES

Local agency responsibilities are detailed in Section 9.6. These responsibilities include:

- Submitting a "DBE Race-Neutral Implementation Agreement for Local Agencies" to the Caltrans DLAE (See Exhibit 9-A).
- Developing an AADPL and submitting it to the Caltrans DLAE for review on the "Local Agency DBE Annual Submittal Form" (See Exhibit 9-B).
- Designating a DBE Liaison Officer, accountable to the Chief Executive Officer of the local agency, to administer the DBE Program.
- Ensuring prompt and full payment to the prime contractor and subcontractor in compliance with the prompt payment clauses of the contract.

- Reporting DBE anticipated participation Local Agency Bidder DBE Information (See Exhibit 15-G “Local Agency Bidder-DBE (Construction Contracts)-Information” and Exhibit 10-O “Local Agency Proposer/Bidder-DBE (Consultant Contracts)-Information”).
- Completing the “Report of Final DBE Utilization” forms (Exhibit 17-F).

9.6 LOCAL AGENCY RESPONSIBILITIES UNDER CALTRANS DBE PROGRAM PLAN

Local agency recipients of federal financial assistance shall comply with all the elements of Title 49, Part 26 of the CFR entitled “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs.” These provisions apply to all federal-aid transportation projects. Local agency responsibilities are detailed in the Caltrans DBE Program Plan. A copy of this plan is available to download from the DLA website at:

http://www.dot.ca.gov/hq/LocalPrograms/DBE_CRLC/DBE_CRLC.html

As an initial step, each local agency shall submit a “DBE Race-Neutral Implementation Agreement for Local Agencies” (Exhibit 9-A, of this chapter) to formally acknowledge the local agencies commitment to implement the Caltrans DBE Program Plan, and to comply with all the prescribed responsibilities detailed in the Plan and explained in the LAPM.

Each local agency shall also annually submit a “DBE Annual Submittal Form” (Exhibit 9-B, of this chapter). This form will provide information for the upcoming Federal Fiscal Year (FFY), which will include:

- (1) the local agency's AADPL
- (2) the methodology for establishing the AADPL
- (3) identification of the Disadvantaged Business Enterprise Liaison Officer (DBELO)
- (4) prompt pay provision to be used in contracts

DBE RACE-NEUTRAL IMPLEMENTATION AGREEMENT FOR LOCAL AGENCIES

This agreement will need to be completed and submitted to the DLAE by June 1, 2006, by each local agency that currently has a DBE Program, or will be receiving federal financial assistance for their transportation projects. This agreement will need to be signed by a representative who is authorized by the governing body to take such action. Local agencies will not be permitted to continue with their own separate DBE programs, unless such programs have been approved directly by a federal agency.

Some of the elements of the Agreement are highlighted below:

OBJECTIVE/POLICY STATEMENT

Each agreement contains a policy statement expressing a commitment to the Caltrans DBE Program, stating its objectives, and outlining responsibilities for its implementation. Each local agency will circulate the statement throughout its organization and to the DBE and non-DBE business communities that perform work on its DOT-assisted contracts.

DBE ANNUAL SUBMITTAL FORM

Each local agency must provide to the Caltrans DLAE a completed “DBE Annual Submittal Form for Local Agencies,” (Exhibit 9-B) by June 1 of each year for the following FFY. This form must be received prior to submitting a “Request for Authorization” to proceed with a federal-aid project. This form will include:

1. The amount of AADPL and the methodology for establishing the AADPL.
2. Designated DBE Coordinator information (name, address, phone number, and e-mail address).
3. Local agency’s choice for method of prompt payment of withheld funds to subcontractors.

DBE LIAISON OFFICER

Each local agency must designate a DBE Liaison Officer (DBELO) who shall have direct independent access to the local agency’s Chief Executive Officer concerning DBE program matters. This person shall be responsible for the duties as described in “Disadvantaged Business Enterprise Race-Neutral Implementation Agreement for Local Agencies” (Exhibit 9-A in this chapter). Annually, the DBELO designation will be reported to Caltrans when the local agency completes its “Local Agency DBE Annual Submittal Form” (Exhibit 9-B in this chapter).

REQUIRED CONTRACT CLAUSES

Contract Assurance

DBE regulations require the following contract assurance statement in every DOT-assisted contract and subcontract.

“The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR, Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract, or such other remedy as recipient deems appropriate.”

Prompt Progress Payment to Subcontractors

Attention is directed to Section 7108.5 of the California Business and Professions Code, which requires a prime contractor or subcontractor to pay any subcontractor not later than 10 days of receipt of each progress payment, unless otherwise agreed to in writing. In addition, Federal Regulation (49 CFR 26.29) requires a prime contractor or subcontractor to pay a subcontractor no later than 30 days of receipt of each payment, unless any delay or postponement of payment among the parties takes place only for good cause and with the prior written approval of the agency. Section 7108.5 of the California Business and Professions Code also contains enforcement actions and penalties. These requirements apply to both DBE and non-DBE subcontractors.

Prompt Payment of Withheld Funds to Subcontractors

Federal Regulation (49 CFR 26.29) requires one of the following three methods be used in federal-aid contracts to ensure prompt and full payment of any retainage kept by the prime contractor or subcontractor to a subcontractor:

1. The local agency may decline to hold retainage from prime contractors and prohibit prime contractors and subcontractors from holding retainage from subcontractors.
2. The local agency may decline to hold retainage from prime contractors and include a contract clause, obligating the prime contractor and subcontractors to make prompt and full payment of any retainage kept by the prime contractor or subcontractor to all subcontractors within 30 days after the subcontractor's work is satisfactorily completed.
3. The local agency may hold retainage from the prime contractor and provide for prompt and regular incremental acceptances of portions of the contract, pay retainage to prime contractors based on the acceptances, and include a contract clause obligating the prime contractor and subcontractors to pay all retainage owed to all subcontractors for satisfactory completion of the accepted work within 30 days after receipt of the retainage. This clause must require the prompt release of retainage payments from the prime contractor to the subcontractor within a specified number of days after the subcontractor's work is satisfactorily completed.

In the above methods, a subcontractor's work is satisfactorily completed when all tasks called for in the subcontract have been accomplished and documented as required by the agency. The work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed, when an agency has made an incremental acceptance of a portion of the contract work. Federal Regulation (49 CFR 26.29) also requires that any delay or postponement of payment among the parties may take place only for good cause, must have the prior written approval of the agency, and that appropriate means of enforcement such as those contained in Section 7108.5 of the California Business and Professions Code must be included in the contract.

Annually, the local agencies choose one of the above three methods to ensure prompt pay. The local agency's choice will be reported to Caltrans when it completes the "Annual DBE Submittal Form" (Exhibit 9-B of this chapter).

BIDDERS LIST

Each local agency will be required to create and maintain a bidders list consisting of information about all DBE and non-DBE firms that bid or quote to the local agency on DOT-assisted contracts. The bidders list will include the name, address, DBE/non-DBE status, date established, and annual gross receipts of firms.

9.7 PROCESS FOR ESTABLISHING ANNUAL ANTICIPATED DBE PARTICIPATION LEVEL (AADPL)

As required by federal law, Caltrans annually establishes a statewide overall DBE goal. When establishing the overall DBE goal, Caltrans must include the level of DBE participation that local agencies could contribute. Local agencies shall calculate the level of DBE participation and utilization that the agency expects could be achieved on contracts to be awarded in its jurisdiction in the following federal fiscal year.

This will include an assessment of the subcontracting opportunities for specific items of work and the DBE availability for specific items of work. In other words, that level of subcontracting opportunities that DBEs could reasonably be expected to compete for on a contract, and their likely availability for work on contracts that will be awarded in a given fiscal year. The AADPL is not a goal that the local agency needs to achieve, but the AADPL will be used by Caltrans to establish a statewide DBE participation goal as required by Title 49, CFR Part 26, Section 26.45.

The AADPL will be submitted to the Caltrans DLAE, using “Local Agency DBE Annual Submittal Form” (Exhibit 9-B of this chapter), annually by June 1 in advance of the FFY beginning October 1 for federal-aid contracts. FHWA recipients will follow this process. An exception to this would be if FTA or FAA recipients were required by FTA or FAA to submit the annual information to them or a designee by another date.

The local agency is not required to obtain Caltrans' prior concurrence with the proposed AADPL. However, if the DLAE's review concludes that the AADPL has not been correctly calculated, or that the method for calculating AADPL is inadequate, the DLAE may, after consulting with the local agency, adjust the AADPL or require that the local agency do so.

For an FHWA recipient, the AADPL should be expressed as a percentage of all federal-aid highway funds that a local agency will award in FHWA-assisted contracts in the forthcoming fiscal year. If the local agency is also an FTA subrecipient receiving funds through Caltrans, the percentage is determined in a similar way, but it includes FTA assisted contracts—excluding FTA funds used to purchase transit vehicles.

METHODOLOGY—STEP 1

The overall participation availability methodology is a two-step process as described in 49 CFR, Part 26, Section 26.45. The first step is determining a base figure for the relative availability of DBEs that are ready, willing and able to participate in the federal-aid contracting program. Five methods are described to accomplish this first step, although other methods or combinations of methods to determine a base figure may be used subject to review and comments by DLAE.

USE OF DBE DIRECTORIES AND CENSUS BUREAU DATA

Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) database, determine the number of all ready, willing and able businesses available in your market that perform work in the same North American Industry Classification System (NAICS) codes. (Information about the CBP database may be obtained from the Census Bureau at their website, www.census.gov/epcd/cbp/view/cbpview.html.) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.

USE OF A BIDDERS LIST

By using the required Bidders List, determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all contractors and consultants that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number of all contractors and consultants to derive a base figure for the relative availability of DBEs in your market.

USE OF DATA FROM A DISPARITY STUDY

Disparity studies generally contain a wide array of statistical data, as well as anecdotal data and analysis that can be particularly useful in the AADPL-setting process. The data, which a good disparity study provides, can be an excellent guide for a recipient to use to set a narrowly tailored participation availability percentage. When setting the goal, first use the study's statistical evidence to set a base figure for the relative availability of DBEs. Other study information, whether it is anecdotal data, analysis, or statistical information about related fields, should be included when making adjustments to the base figure (see Step 2 below), but not included in the base figure for the relative availability of DBEs. Any study data relied on in the goal setting process should be as recent as possible and be focused on the transportation contracting industry.

USE OF THE GOAL OF ANOTHER LOCAL AGENCY

If another DOT recipient in the same, or substantially similar market, has set an AADPL in compliance with 49 CFR, Part 26, you may use that figure as a base figure for your participation availability percentage.

USE OF ALTERNATIVE METHODS

Local agencies may use other methods to determine a base figure for their overall participation availability percentage. Any methodology chosen must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a participation availability percentage that is rationally related to the relative availability of DBEs in the local agencies' market.

METHODOLOGY—STEP 2

Once a base figure has been determined, local agencies must survey their jurisdiction to determine what types of relevant evidence is available to them. Then, relying on their own knowledge of their contracting markets, local agencies must review the evidence to determine whether an up or down adjustment from the base figure is needed. Some types of evidence to consider include the following:

- The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years.
- Evidence from disparity studies conducted anywhere within your jurisdiction to the extent it is not already accounted for in your base figure.
- If your base figure is the figure of another recipient, you must adjust it for differences in your local market and your contracting program.

You may also consider available evidence from related fields that affect the opportunities for DBEs to form, grow, and compete. These include, but are not limited to:

- Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program.
- Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.

If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the “but for” factor), or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

RACE-NEUTRAL COMPONENTS

You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures; is awarded a subcontract on a prime contract that does not carry a DBE goal; or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low-bid system to award subcontracts).

Race-neutral means include, but are not limited to, the following:

1. Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small business participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);
2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses obtain bonding and financing);
3. Providing technical assistance and other services;
4. Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);
5. Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
6. Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a various types of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

7. Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;
8. Ensuring distribution of the DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors;
9. Assisting DBEs and other small businesses to develop their capability to utilize emerging technology and conduct business through electronic media.

TRANSIT VEHICLE MANUFACTURERS

If the local agency is also an FTA recipient, the FTA assistance used in transit vehicle procurements is not used in the base amount from which an overall AADPL is calculated.

TRANSIT VEHICLE MANUFACTURER'S ANNUAL AVAILABILITY GOAL

Transit vehicle manufacturers must establish and submit for FTA's approval an annual overall AADPL. In setting the overall AADPL, transit vehicle manufacturers should be guided to the extent applicable by the principles underlying Section 26.49, Part 26 of Title 49 CFR. The base from which transit vehicle manufacturers calculate this AADPL is the amount of FTA financial assistance included in transit vehicle contracts that will be performed during the fiscal year in question. Transit vehicle manufacturers must exclude from this base funds attributable to work performed outside the United States, and its territories, possessions, and commonwealths.

In lieu of complying with the aforementioned procedures, local agencies may, with FTA approval, establish project-specific availability goals for DBE participation in the procurement of transit vehicles. Transit vehicle manufacturers should contact FTA for applicable procedures.

9.8 DBE PARTICIPATION ON CONTRACT

PARTICIPATION OPPORTUNITIES

The local agency should structure its project development, contract items, and specifications in a manner that provides opportunities for DBE participation. Participation by DBEs is possible at four main points in the process for developing local federal-aid transportation projects. They are:

- Preliminary Engineering (PE) and Environmental Analysis (EA)
- Final Design
- Right of Way Acquisition
- Construction, including Construction Management

Preliminary Engineering Studies (PES) and (EA) are the first steps in developing a local transportation project. DBEs may be engaged to perform all of these activities as a prime consultant or some of these activities as a member of a team of consultants.

Completion of final design and preparation of PS&E normally are a continuation of PE activities. However, in some situations the agency employs different consultants and professional teams to perform these final design activities. DBEs may be engaged at this point.

Acquisition of R/W for local transportation projects may be performed by the local agency or by a qualified consulting firm. Qualified DBEs may be considered for performance of R/W activities.

DBEs may participate in bidding for construction contracts for projects developed by local agencies. Other opportunities for participation in construction include work as subcontractors, suppliers, vendors, truckers, etc.

DBE CONTRACT REQUIREMENTS

LOCAL AGENCY BIDDER DBE INFORMATION

A "Local Agency Bidder DBE Information" form (Exhibit 15-G) "Local Agency Bidder-DBE (Construction Contracts)-Information" of the LAPM for construction contracts or (Exhibit 10-O) "Local Agency Proposer/Bidder-DBE (Consultant Contract) Information" of the LAPM for Consultant Contracts) will be included in the contract documents to be executed by the successful bidder. The purpose of these forms is to collect data required under 49 CFR 26. Even if no DBE participation is achieved, the successful bidder must execute and return the form. The completed "Local Agency Bidder DBE Information" form must be submitted to the DLAE at the time of contract execution.

The successful bidder's "Local Agency Bidder DBE Information" form should include the names, addresses and phone numbers of DBE firms that will participate, with a complete description of work or supplies to be provided by each, and the dollar value of each DBE transaction. When 100 percent of a contract item of work is not to be performed or furnished by a DBE, a description of the exact portion of that work to be performed or furnished by that DBE should be included in the DBE information, including the planned location of that work. A bidder certified as a DBE should describe the work it has committed to performing with its own forces, as well as any other work that it has committed to be performed by DBE subcontractors, suppliers, and trucking companies.

The bidder is encouraged to provide written confirmation from each DBE participating in the contract. A copy of a DBE's quote will serve as written confirmation that the DBE is participating in the contract. If a DBE is participating as a joint venture partner, the bidder is encouraged to submit a copy of the joint venture agreement.

FINAL REPORT

Upon completion of the contract, regardless of whether DBE participation is obtained, a summary of the DBE records shall be prepared, certified correct, and submitted on the form “Final Report- Utilization of Disadvantaged Business Enterprise (DBE) First-Tier Subcontractors” (Exhibit 17-F) or equivalent, by the contractor to the local agency showing total dollars paid to each subcontractor and supplier whether DBE or non-DBE. Exhibit 17-F is reviewed by the local agency and certified as complete and accurate.

Consultant Contracts: The local agency must send the original plus one copy of the completed Final Report of Utilization of Disadvantaged Businesses (see Chapter 17, Exhibit 17-F of the LAPM) with the final invoice to the DLAE within 30 days after completion of the contract (see Chapter 10, Consultant Selection of the LAPM).

Construction Contracts: The local agency must send the original plus one copy of the completed Final Report of Utilization of Disadvantaged Businesses (see Chapter 17, Exhibit 17-F of the LAPM) to the DLAE as part of its “Report of Expenditure” package before final payment (see Chapter 17, Project Completion of the LAPM).

COUNTING DBE PARTICIPATION

Actual payment to subcontractors that are certified DBEs and performing a commercially useful function will be counted as DBE participation. If the prime contractor is a qualified DBE, his/her work is reported and counted toward the contract participation.

“Final Report Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subcontractors” is the DBE utilization form to be completed at the completion of a contract and submitted to the DLAE (see Chapter 17 for specific instructions). The information in this report is required by the DBE Program and the FHWA to demonstrate DBE participation on local agency projects.

Specific instances of counting DBE participation are presented in the following sections.

PERFORMED BY DBE

When a DBE participates in a contract, count only the value of the work actually performed by the DBE.

- Count the entire amount of that portion of a contract that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
- Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, provided that the local agency determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

- When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE participation only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE participation.

JOINT VENTURE

When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward the DBE participation.

COMMERCIALLY USEFUL FUNCTION

Count expenditures to a DBE contractor only if the DBE is performing a commercially useful function on that contract. The following examples explain what is considered to be performing a commercially useful function:

- A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible with respect to materials and supplies used on the contract for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable), and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the local agency must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.
- A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the local agency must examine similar transactions, particularly those in which DBEs do not participate.
- If a DBE does not perform or exercise responsibility for at least thirty percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, one must presume that it is not performing a commercially useful function.
- When a DBE is presumed not to be performing a commercially useful function, as provided in the previous bullet, the DBE may present evidence to rebut this presumption. The local agency's determination as to whether the firm is performing a commercially useful function should be based upon the type of work involved and normal industry practices.
- Local agencies' decisions on commercially useful function matters are subject to review by the DLAE.

DBE TRUCKING

Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

- The DBE must be responsible for the management and supervision of the entire trucking operation for which it is getting credit on a particular contract, and there cannot be a contrived arrangement for the purpose of counting DBE participation.
- The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
- The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
- The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
- The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.
- A lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck.

MATERIALS AND SUPPLIES

Count expenditures with DBEs for materials or supplies toward DBE participation as provided in the following:

- If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE participation.

Note: For purposes of counting DBE participation, a manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

- If the materials or supplies are purchased from a DBE regular dealer, count sixty percent of the cost of the materials or supplies toward DBE participation.

Note: For purposes of counting DBE participation, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

To be a regular dealer, the firm must be an established business that regularly engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not considered regular dealers for purposes of counting DBE participation.

- With respect to materials or supplies purchased from a DBE, which is neither a manufacturer nor a regular dealer; count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies; fees or transportation charges for the delivery of materials or supplies required on a job site toward DBE participation, provided the local agency determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. However, do not count any portion of the cost of the materials and supplies themselves toward DBE participation.

NOT COUNTING PARTICIPATION

If a firm is not currently certified as a DBE at the time of the execution of the contract, do not count the firm's participation, except as provided for under "Decertification" of this section.

Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified.

Do not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or the local agency's overall participation until the amount being counted toward the participation has been paid to the DBE.

APPARENT LACK OF CONTROL

In order for a firm to become a certified DBE, it needs to meet the various requirements prescribed in the CFR, as administered by the California Unified Certification Program (UCP). The DBE must be in control of the firm.

Some situations may arise where the work to be performed by the DBE is being performed by someone else. The local agency will have to use discretion of when to investigate, or report apparent cases of fraud to Caltrans. Caution is needed because those involved in performing the work may legitimately be doing so. Three areas are highlighted here.

1. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not; however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.
2. The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be, such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.
3. The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities, and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

DBE ELIGIBILITY

Whether a firm (consultant or contractor) is certified as an eligible DBE is a decision that is made by the UCP. The UCP can also remove the eligibility of a firm and issue a written notice of ineligibility. A directory of certified DBE firms is available from the Caltrans Civil Rights, Business Enterprises Program website at:
<http://www.dot.ca.gov/hq/bep>

The Caltrans directory list is available in hard copy from:

Department of Transportation
Central Publications Distribution Unit
1900 Royal Oaks Drive
Sacramento, CA 95815
Phone: (916) 445-3520
Fax (916) 324-8997
E-mail: <http://caltrans-opac.ca.gov/publicat.htm>

An electronic listing of DBEs is also available on the website of the Caltrans Civil Rights Program under the Caltrans Bulletin Board System. For further information, contact the Caltrans Disadvantaged Business Enterprise Program, Systems Support (916) 654-6598 or 654-3496.

CERTIFICATION

A potential DBE may request certification from Caltrans by requesting an application form at:

Department of Transportation
Business Enterprise Program
Office of Certification Analysis
PO Box 942874, MS - 79
Sacramento, CA 94274-0001
Phone: (916) 227-9599

The form may also be downloaded from the internet at:

<http://www.dot.ca.gov/hq/bep/downloads.html>

DECERTIFICATION

Regarding DBE participation on a contract, two different actions can take place depending on when a firm was issued a notice of ineligibility relative to when the contract was executed:

1. When a prime contractor has made a commitment to use a DBE firm, or the local agency has made a commitment to use a DBE prime contractor, but a subcontract or contract has not been executed before the issuance of the decertification notice, the ineligible firm does not count toward contract DBE participation.
2. If a prime contractor has executed a subcontract with a DBE firm before the DBE firm was notified of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE participation for the firm's work. In this case, or in a case where the local agency had let a prime contract to a DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the local agency issued the notice of its ineligibility shall not count toward the local agency's overall participation, but may count toward the contract participation.

EXCEPTION

If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, the local agency may continue to count its participation on that contract toward overall and contract participation.

APPEAL

When the UCP makes an administratively final removal of a firm's eligibility, the firm may appeal the removal to the DOT under Section 26.89 of 49 CFR, Part 26. Caltrans will provide information for an appeal with the removal of eligibility.

9.9 REFERENCES

49 CFR, Part 26 (DBE Regulations)
49 CFR, Part 21 (Title VI Regulations)
49 CFR, Part 27 (Accessibility)
23 CFR 200 and 230 (EEO Contractor Compliance)
28 CFR, Part 35 (Accessibility)
23 USC 140(a) (EEO Contractor Compliance)
29 USC 791 et seq (Accessibility)
42 USC 12101 et seq (Accessibility)
California Business and Professions Code, Section 7108.5 (Prompt Payment)
Title 24 of the California Government Code (Accessibility)

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**Exhibit 9-A Disadvantaged Business Enterprise Race-Neutral Implementation Agreement for
Local Agencies**

**DISADVANTAGED BUSINESS ENTERPRISE
RACE-NEUTRAL
IMPLEMENTATION AGREEMENT
FOR
LOCAL AGENCIES**

DISADVANTAGED BUSINESS ENTERPRISE RACE-NEUTRAL IMPLEMENTATION AGREEMENT

For the City/County of _____, hereinafter referred to as
“RECIPIENT.”

I Definition of Terms

The terms used in this agreement have the meanings defined in 49 CFR § 26.5.

II OBJECTIVE/POLICY STATEMENT (§26.1. 26/23)

The RECIPIENT intends to receive federal financial assistance from the U. S. Department of Transportation (DOT) through the California Department of Transportation (Caltrans), and as a condition of receiving this assistance, the RECIPIENT will sign the California Department of Transportation’s Disadvantaged Business Enterprise Implementation Agreement (hereinafter referred to as Agreement). The RECIPIENT agrees to implement the State of California, Department of Transportation Disadvantaged Business Enterprise (DBE) Program Plan (hereinafter referred to as the DBE Program Plan) as it pertains to local agencies. The DBE Program Plan is based on U.S. Department of Transportation (DOT), 49 CFR, Part 26 requirements.

It is the policy of the RECIPIENT to ensure that DBEs, as defined in Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also their policy:

- To ensure nondiscrimination in the award and administration of DOT-assisted contracts.
- To create a level playing field on which DBE’s can compete fairly for DOT-assisted contracts.
- To ensure that their annual overall DBE participation percentage is narrowly tailored, in accordance with applicable law.
- To ensure that only firms that fully meet 49 CFR, Part 26 eligibility standards are permitted to participate as DBEs.
- To help remove barriers to the participation of DBEs in DOT-assisted contracts.
- To assist the development of firms that can compete successfully in the market place outside the DBE Program.

III Nondiscrimination (§26.7)

RECIPIENT will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR, Part 26 on the basis of race, color, sex, or national origin. In administering the local agency components of the DBE Program Plan, the RECIPIENT will not, directly, or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE Program Plan with respect to individuals of a particular race, color, sex, or national origin.

IV Annual DBE Submittal Form (§26.21)

The RECIPIENT will provide to the Caltrans District Local Assistance Engineer (DLAE) a completed *Local Agency DBE Annual Submittal Form* (Exhibit 9-B) by June 1 of each year for the following Federal Fiscal Year (FFY). This form includes an Annual Anticipated DBE Participation Level (AADPL), methodology for establishing the AADPL, the name, phone number, and electronic mailing address of the designated DBELO, and the choice of Prompt Pay Provision to be used by the RECIPIENT for the following FFY.

V Race-Neutral Means of Meeting the Annual DBE Goal (§26.51)

RECIPIENT will assist Caltrans to achieve its Overall Statewide DBE Goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low-bid system to award subcontracts).

Race-neutral means include, but are not limited to, the following:

1. Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);
2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);
3. Providing technical assistance and other services;
4. Carrying out information and communication programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists of bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);
5. Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
6. Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of types of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
7. Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;
8. Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and
9. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

VI Quotas (§26.43)

RECIPIENT will not use quotas or set-asides in any way in the administration of the local agency component of the DBE Program Plan.

VII DBE Liaison Officer (DBELO) (§26.25)

RECIPIENT has designated a DBE Liaison Officer. The DBELO is responsible for implementing the DBE Program Plan, as it pertains to the RECIPIENT, and ensures that the RECIPIENT is fully and properly advised concerning DBE Program Plan matters. [Specify resources available to the DBELO; e.g., the DBELO has a staff of two professional employees assigned to the DBE program on a full-time basis and two support personnel who devote a portion of their time to the program.] The name, address, telephone number, electronic mail address, and an organization chart displaying the DBELO's position in the organization are found in Attachment _____ to this Agreement. This information will be updated annually and included on the DBE Annual Submittal Form.

The DBELO is responsible for developing, implementing, and monitoring the RECIPIENT's requirements of the DBE Program Plan in coordination with other appropriate officials. Duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to determine projected Annual Anticipated DBE Participation Level.
4. Ensures that bid notices and requests for proposals are made available to DBEs in a timely manner.
5. Analyzes DBE participation and identifies ways to encourage participation through race-neutral means.
6. Participates in pre-bid meetings.
7. Advises the CEO/governing body on DBE matters and DBE race-neutral issues.
8. Provides DBEs with information and recommends sources to assist in preparing bids, obtaining bonding and insurance.
9. Plans and participates in DBE training seminars.
10. Provides outreach to DBEs and community organizations to fully advise them of contracting opportunities.

VIII Federal Financial Assistance Agreement Assurance (§26.13)

RECIPIENT will sign the following assurance, applicable to and to be included in all DOT-assisted contracts and their administration, as part of the program supplement agreement for each project.

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract, or in the administration of its DBE Program, or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR, Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE Program, as required by 49 CFR, Part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.). [Note – this language is to be used verbatim, as it is stated in §26.13(a).]

IX DBE Financial Institutions (§26.27)

It is the policy of the RECIPIENT to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions.

Information on the availability of such institutions can be obtained from the DBELO. The Caltrans' Disadvantaged Business Enterprise Program may offer assistance to the DBELO.

X Directory (§26.31)

RECIPIENT will refer interested persons to the Unified Certification Program DBE directory available from the Caltrans Disadvantaged Business Enterprise Program's website at www.dot.ca.gov/hq/bep.

XI Required Contract Clauses (§§26.13, 26.29)

RECIPIENT ensures that the following clauses or equivalent will be included in each DOT-assisted prime contract:

A. CONTRACT ASSURANCE

The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR, Part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy, as recipient deems appropriate.

[Note – This language is to be used verbatim, as is stated in §26.13(b). See Caltrans Sample Boiler Plate Contract Documents on the Internet at www.dot.ca.gov/hq/LocalPrograms under "Publications."]

B. PROMPT PAYMENT

Prompt Progress Payment to Subcontractors

A prime contractor or subcontractor shall pay to any subcontractor not later than 10-days of receipt of each progress payment, in accordance with the provision in Section 7108.5 of the California Business and Professions Code concerning prompt payment to subcontractors. The 10-days is applicable unless a longer period is agreed to in writing. Any delay or postponement of payment over 30 days may take place only for good cause and with the agency's prior written approval. Any violation of Section 7108.5 shall subject the violating contractor or subcontractor to the penalties, sanctions, and other remedies of that Section. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

Prompt Payment of Withheld Funds to Subcontractors

The local agency shall include either (1), (2), or (3) of the following provisions [local agency equivalent will need Caltrans approval] in their federal-aid contracts to ensure prompt and full payment of retainage [withheld funds] to subcontractors in compliance with 49 CFR 26.29.

1. No retainage will be held by the agency from progress payments due to the prime contractor. Prime contractors and subcontractors are prohibited from holding retainage from subcontractors. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.
2. No retainage will be held by the agency from progress payments due the prime contractor. Any retainage kept by the prime contractor or by a subcontractor must be paid in full to the earning subcontractor in 30 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

3. The agency shall hold retainage from the prime contractor and shall make prompt and regular incremental acceptances of portions, as determined by the agency of the contract work and pay retainage to the prime contractor based on these acceptances. The prime contractor or subcontractor shall return all monies withheld in retention from all subcontractors within 30 days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the agency. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating prime contractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of: a dispute involving late payment or nonpayment by the contractor; deficient subcontractor performance; and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.

XII Local Assistance Procedures Manual

The RECIPIENT will advertise, award and administer DOT-assisted contracts in accordance with the most current published Local Assistance Procedures Manual (LAPM).

XIII Bidders List (§26.11)

The RECIPIENT will create and maintain a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on its DOT-assisted contracts. The bidders list will include the name, address, DBE/non-DBE status, age, and annual gross receipts of the firms.

XIV Reporting to the DLAE

RECIPIENT will promptly submit a copy of the Local Agency Bidder-DBE Information (Exhibit 15-G "Local Agency Bidder-DBE (Construction Contracts) – Information" or Exhibit 10-O "Local Agency Proposer/Bidder-DBE (Consultant Contracts)-Information" of the LAPM) to the DLAE at the time of execution of consultant or construction contract award.

RECIPIENT will promptly submit a copy of the Final Utilization of DBE participation to the DLAE using Exhibit 17-F "Final Report – Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subcontractors" of the LAPM immediately upon completion of the contract for each consultant or construction contract.

XV Certification (§26.83(a))

RECIPIENT ensures that only DBE firms currently certified by the California Unified Certification Program will participate as DBEs on DOT-assisted contracts.

XVI Confidentiality

RECIPIENT will safeguard from disclosure to third parties, information that may reasonably be regarded as confidential business information consistent with federal, state, and local laws.

By _____
(Signature)

Phone Number: _____

(Print Name and Title) ADMINISTERING AGENCY
(Authorized Governing Body Representative)

This California Department of Transportation's Disadvantaged Business Enterprise Program Plan Implementation Agreement is accepted by:

[Signature of DLAE]

Date: _____

[Print Name of DLAE]

Distribution: (1) Original – DLAE
(2) Signed copy by the DLAE – Local Agency

DBE Race-neutral Implementation Agreement for Local Agencies (05/01/06)

Exhibit 9-B Local Agency DBE Annual Submittal Form

TO: CALTRANS DISTRICT _____
District Local Assistance Engineer

The amount of the Annual Anticipated DBE Participation Level (AADPL) and methodology are presented herein, in accordance with Title 49 of the Code of Federal Regulations, Part 26, and the State of California, Department of Transportation Disadvantaged Business Enterprise (DBE) Program Plan.

The City/County/Region of _____,
submits our AADPL information. We have established an AADPL of _____ % for the Federal Fiscal Year
_____/_____, beginning on _____, and ending on _____.

Methodology

[Please attach the methodology used to determine the AADPL. See Chapter 9, Section 9.7 of the Local Assistance Procedures Manual (LAPM) for guidance in developing the AADPL.]

Disadvantaged Business Enterprise Liaison Officer (DBELO)

[Please provide the name, address, phone number, fax number, and electronic mail address of the DBELO for the coming Federal Fiscal Year.]

Prompt Pay

Federal regulation (49 CFR 26.29) requires one of three methods be used in federal-aid contracts to ensure prompt and full payment of any retainage, kept by the prime contractor or subcontractor, to a subcontractor. (Attached is a listing of the three methods. On the attachment, please designate which prompt payment provision the local agency will use.)

(Signature)

Date

(Print Name and Title)
ADMINISTERING AGENCY
(Authorized Governing Body Representative)

Phone Number

(Signature of Caltrans District Local Assistance Engineer [DLAE])

Date

Distribution: (1) Original - DLAE
(2) Signed copy by the DLAE – Local Agency

DBE Annual Submittal Form (05/01/06)

(Attachment)

Prompt Payment of Withheld Funds to Subcontractors

Federal regulation (49 CFR 26.29) requires one of the following three methods be used in federal-aid contracts to ensure prompt and full payment of any retainage kept by the prime contractor or subcontractor to a subcontractor.

Please check the box of the method chosen by the local agency to ensure prompt and full payment of any retainage.

- ☐ No retainage will be held by the agency from progress payments due to the prime contractor. Prime contractors and subcontractors are prohibited from holding retainage from subcontractors. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors
- ☐ No retainage will be held by the agency from progress payments due the prime contractor. Any retainage kept by the prime contractor or by a subcontractor must be paid in full to the earning subcontractor in 30 days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating contractor or subcontractor to the penalties, sanctions, and remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the contractor or subcontractor in the event of a dispute involving late payment or nonpayment by the contractor, deficient subcontractor performance, and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.
- ☐ The agency shall hold retainage from the prime contractor and shall make prompt and regular incremental acceptances of portions, as determined by the agency of the contract work and pay retainage to the prime contractor based on these acceptances. The prime contractor or subcontractor shall return all monies withheld in retention from all subcontractors within 30 days after receiving payment for work satisfactorily completed and accepted including incremental acceptances of portions of the contract work by the agency. Any delay or postponement of payment may take place only for good cause and with the agency's prior written approval. Any violation of these provisions shall subject the violating prime contractor to the penalties, sanctions, and other remedies specified in Section 7108.5 of the California Business and Professions Code. This requirement shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise available to the contractor or subcontractor in the event of: a dispute involving late payment or nonpayment by the contractor; deficient subcontractor performance and/or noncompliance by a subcontractor. This clause applies to both DBE and non-DBE subcontractors.